

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | |
|--|--|
| <p>NORTHEAST CONTROLS, INC., 3 Enterprise Avenue Clifton Park New York, NY 12065</p> <p>ST. PAUL MERCURY INSURANCE COMPANY 385 Washington Street St. Paul, MN 55102</p> <p>Plaintiffs,</p> <p>v.</p> <p>FISHER CONTROLS INTERNATIONAL, LLC 205 S. Center Street Marshalltown, Iowa 50158</p> <p>Defendant.</p> | <p>NO. 06-412</p> <p>AFFIDAVIT OF DANIEL J. GUNTER IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL DEPOSITIONS OF MICHAEL PETERS AND ALBERT CAPPELLINI</p> |
|--|--|

STATE OF WASHINGTON)
 : ss.
County of King)

I, DANIEL J. GUNTER, being duly sworn, depose and state as follows:

1. I am one of the attorneys representing defendant Fisher Controls International, LLC (“Fisher”), in the above matter. I am competent to attest as to the matters set forth herein, and I make this affidavit based on my personal knowledge.

2. The incidents underlying the current action were also at issue in four prior actions: Fisher was named as a defendant in four separate lawsuits filed against Fisher in the New Castle,

County, Delaware Superior Court: Olson v. Motiva Enterprises LLC (No. 02C-04-263); Praxair, Inc., v. Fisher Controls International, Inc. (No. 02C-05-190); Motiva Enterprises, LLC v. Fisher Controls International, Inc. (No. 02C-05-169); and Great American Assurance Co. v. Fisher Controls International, Inc. (No. 02C-05-168).

3. Fisher and Northeast Controls executed a Joint Defense Agreement and cooperated in the defense of the four Underlying Actions.

4. Fisher eventually moved for summary judgment on all claims brought by the three corporate plaintiffs—specifically, Motiva, Great American, and Praxair.

5. Counsel for Fisher has made a reasonable effort to reach agreement with plaintiffs on the matter set forth in this motion. On August 20, 2007, after receiving plaintiffs' counsel's letter stating that plaintiffs would not produce the witnesses, I telephoned Thomas Wagner and left a voice-mail for him, requesting a Rule 37 conference relating to the deposition issue. I followed up with the emails attached as exhibits to this affidavit.

6. In the Underlying Actions, counsel for Fisher did not ask Mr. Cappellini a single question on the record.

7. In this action, Fisher's attorneys wish to depose Mr. Cappellini to obtain from him testimony confirming that Northeast Controls was negligent. In addition, Fisher's attorneys wish to question Mr. Cappellini regarding two documents that Northeast Controls did not produce in the Underlying Actions.

8. Attached hereto as Exhibit 1 is a true and correct copy of plaintiffs' initial disclosures in this matter.

9. Attached hereto as Exhibit 2 is a true and correct copy of an email sent by Fisher's counsel to plaintiffs' counsel on August 6, 2007, relating to the scheduling of the depositions of Messrs. Peters and Cappellini.

10. Attached hereto as Exhibit 3 is a true and correct copy of an email sent by Fisher's

counsel to plaintiffs' counsel on August 10, 2007, relating to the scheduling of the depositions of Messrs. Peters and Cappellini.

11. Attached hereto as Exhibit 4 is a true and correct copy of an email sent by plaintiffs' counsel to Fisher's counsel on August 10, 2007, relating to the scheduling of the depositions of Messrs. Peters and Cappellini.

12. Attached hereto as Exhibit 5 is a true and correct copy of an email sent by plaintiffs' counsel to Fisher's counsel on August 10, 2007, relating to the scheduling of the depositions of Messrs. Peters and Cappellini.

13. Attached hereto as Exhibit 6 is a true and correct copy of an email sent by Fisher's counsel to plaintiffs' counsel on August 10, 2007, relating to the scheduling of the depositions of Messrs. Peters and Cappellini.

14. Attached hereto as Exhibit 7 is a true and correct copy of the notice of deposition of Messrs. Peters and Cappellini efiled on August 10, 2007.

15. Attached hereto as Exhibit 8 is a true and correct copy of a letter dated August 16, 2007, by plaintiffs' counsel relating to the depositions of Messrs. Peters and Cappellini. Fisher's counsel received this letter on August 20, 2007.

16. Attached hereto as Exhibit 9 is a true and correct copy of an email sent by Fisher's counsel to plaintiffs' counsel on August 20, 2007, relating to the scheduling of the depositions of Messrs. Peters and Cappellini.

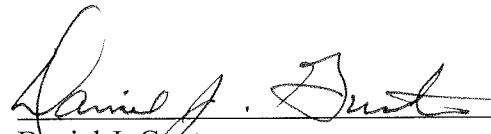
17. Attached hereto as Exhibit 10 is a true and correct copy of an email sent by plaintiffs' counsel to Fisher's counsel on August 22, 2007, relating to the scheduling of the depositions of Messrs. Peters and Cappellini.

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18. Attached hereto as Exhibit 11 is a true and correct copy of an email sent by plaintiffs' counsel to Fisher's counsel on August 23, 2007, relating to the scheduling of the depositions of Messrs. Peters and Cappellini.


Daniel J. Gunter

Subscribed and sworn to before me this 24th day of August, 2007.


DAVID D. BUCK
Notary Public, State of Washington
My commission expires: 7-25-11
Residing at Seattle, WA

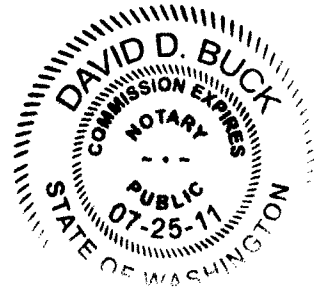


EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|------------------------------|---|----------------------------|
| NORTHEAST CONTROLS, INC. and |) | C.A. No. 1:06-CV-00412 SLR |
| ST. PAUL MERCURY INSURANCE |) | |
| COMPANY, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| FISHER CONTROLS |) | |
| INTERNATIONAL, LLC, |) | |
| |) | |
| Defendants. |) | |

**INITIAL DISCLOSURES OF PLAINTIFFS, NORTHEAST CONTROLS,
INC. AND ST. PAUL MERCURY INSURANCE COMPANY**

Plaintiffs, Northeast Controls, Inc. and St. Paul Mercury Insurance Company, by and through their attorneys, Rawle & Henderson, LLP, make the following Initial Disclosures pursuant to Federal Rule of Civil Procedure 26(a):

PRELIMINARY STATEMENT

Plaintiffs make the following disclosures pursuant to Federal Rule of Civil Procedure 26(a). Plaintiffs make these disclosures based on its current information and the knowledge, facts, circumstances and legal theories involved in the underlying actions which give rise to this instant matter. Plaintiffs anticipate that minimal discovery, investigation and analysis will be needed, but should additional information develop, it will amend and supplement these disclosures in accordance with Federal Rule of Civil Procedure 26(e).

A. PERSONS WITH KNOWLEDGE

1. Michael J. Peters, Northeast Controls, Inc.
Three Enterprise Drive
Clifton Park, NY 12065

Mr. Peters is a signatory to the original Representative Agreement between Fisher Controls International, Inc. and Northeast Controls, Inc. dated January 1, 2000.

2. Signatory of area vice President for Fisher Controls International, Inc. to the Representative Agreement.

3. David Whelan
199 Glen Rock Road
Exeter, RI 02822

Mr. Whelan was a Fisher employee involved in the ordering of the valve at issue in the underlying litigation.

4. Dr. Robert A. Mostello
AMSC Corp.
981 Route 22 West
Suite 101
Bridgewater, NJ 08007

Dr. Mostello has knowledge relating to the performance of the Fisher valve at issue in this matter, consistent with reports issued by Dr. Mostello in the underlying actions.

5. John Sperino, Assistant Secretary
Fisher Controls International, LLC

Mr. Sperino has knowledge of the Joint Defense Privilege Agreement.

6. Gerard Muller
Serry- Tech, Inc.
20 Ellsworth Avenue
Morristown, NJ 07960

Mr. Muller submitted expert reports on behalf of the plaintiff in the *Olson* action.

7. David P. Pope
Address to be provided

Mr. Pope submitted expert reports on behalf of the plaintiff in the *Olson* action.

B. RELEVANT DOCUMENTS

In accordance with Rule 26, plaintiffs hereby identify categories of documents it may use in this matter.

1. All depositions taken in the underlying actions. As a party to these underlying actions, Fisher's counsel is in possession of these deposition transcripts.
2. Exhibits introduced at depositions taken in the underlying actions.
Fisher's counsel is in possession of these exhibits.
3. Expert reports of Mostello, Pope and Muller produced in the underlying actions. Fisher has access to these reports. In the event there is a report that will be used outside of Fisher's access, plaintiffs will provide a copy of said report to defendant.
4. Any and all pleadings, motions and discovery documents produced in the underlying actions.
5. Representative Agreement between Northeast Controls and Fisher.
6. The Joint Defense Privilege Agreement executed in May, 2005 by Fisher and Northeast Controls, Inc.

C. CALCULATION OF DAMAGES

Plaintiffs have incurred the following losses as a result of defendant's breach of contract of the indemnity agreement as follows:

| | |
|--------------------------------------|----------------------|
| Attorneys' fees and costs: | \$ 537,555.98 |
| Money contributed toward settlement: | <u>\$ 601,000.00</u> |
| Total: | \$1,138,555.98 |

D. INSURANCE AGREEMENTS OR POLICIES

Not applicable.

RAWLE & HENDERSON, LLP

By: 

William J. Cattie, III, Esq.
I. D. No. 953
300 Delaware Avenue, Suite 1015
P. O. Box 588
Wilmington, DE 19899-0588
(302) 778-1200
Attorney for Plaintiffs

OF COUNSEL:

Thomas P. Wagner, Esquire
Andrew R. Benedict, Esquire
RAWLE & HENDERSON, LLP
The Widener Building
One South Penn Square
Philadelphia, PA 19107
Ph: 215-575-4200
Fax: 215-563-3583

Date: November 16, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|------------------------------|---|----------------------------|
| NORTHEAST CONTROLS, INC. and |) | C.A. No. 1:06-CV-00412 SLR |
| ST. PAUL MERCURY INSURANCE |) | |
| COMPANY, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| FISHER CONTROLS |) | |
| INTERNATIONAL, LLC, |) | |
| |) | |
| Defendants. |) | |

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of November, 2006, a copy of
Plaintiffs' Initial Disclosures was served via U.S. mail and efilng notification upon the
following person(s):

Paul A. Bradley
Maron & Marvel, P.A.
1201 N. Market Street, Ste. 900
P.O. Box 288
Wilmington, DE 19899

RAWLE & HENDERSON, LLP

By: /s/ William J. Cattie, III #953
William J. Cattie, III, Esq.
I. D. No. 953
300 Delaware Avenue, Suite 1015
P. O. Box 588
Wilmington, DE 19899-0588
(302) 778-1200
Attorney for Plaintiffs

EXHIBIT 2

Gunter, Dan

From: Gunter, Dan
Sent: Monday, August 06, 2007 10:03 PM
To: Wagner, Thomas P.; 'Shannon, J. Scott'
Cc: McVey, Patrick; 'Paul A. Bradley'
Subject: St. Paul v. Fisher: depositions

Tom and Scott--

We would like to schedule the depositions of Mike Peters and Bert Cappellini for the week of August 27. Given that St. Paul filed suit in Delaware, we could notice the depositions for that location. But we would also be amenable to taking the depositions in upstate New York, for the convenience of Messrs. Peters and Cappellini. We anticipate requiring a day for each of the witnesses (i.e., two days for both).

Please advise us as to Messrs. Peters and Cappellini's availability during that week.

Best regards,

Dan Gunter

8/23/2007

FCI/MOC 0006

EXHIBIT 3

Gunter, Dan

From: Gunter, Dan
Sent: Friday, August 10, 2007 9:58 AM
To: 'Shannon, J. Scott'; Wagner, Thomas P.
Cc: McVey, Patrick; 'Paul A. Bradley'
Subject: Depositions of Cappellini and Peters

Gentlemen--

Not having heard from you regarding the depositions of Bert Cappellini and Mike Peters, we will serve you later today with notices of depositions of those gentlemen for August 30 and 31 (respectively), each beginning at 9:30 a.m. at Paul Bradley's office in Wilmington.

We would also be amenable to setting these depositions in New York, for the convenience of the witnesses. If the witnesses would prefer that location, please advise us as to the location, and we will amend the notices.

--Dan

EXHIBIT 4

Gunter, Dan

From: Shannon, J. Scott [JSShannon@MDWCG.com]
Sent: Friday, August 10, 2007 10:13 AM
To: Gunter, Dan; Wagner, Thomas P.
Cc: McVey, Patrick; Paul A. Bradley
Subject: RE: Depositions of Cappellini and Peters

Dan,

When I received your request for availability and proposal to depose in NY, I forwarded it to NEC with the request that they let me know their availability. I just received the e-mail response this morning, it came in while I was in Court on another matter.

Apologies that I did not get back to you sooner. I didn't realize that we were on such a short time frame as the mediation is next week, I thought we were all approaching the mediation in a good faith effort to determine whether we would be able to negotiate a resolution, and I was unaware that you wished to issue deposition notices prior to next Wednesday.

And, frankly, although I received the e-mail and previewed it enough to know that it contains dates/availability and a response to your proposal to depose in NY, I have had other matters occupying my attention.

I would appreciate it if you could hold off on unilaterally filing deposition notices until I've had the opportunity to convert my client's responses to me into an appropriate response to you which should address your questions.

Your courtesy and cooperation is appreciated.

Warmest regards,
s/Scott Shannon
MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN
1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899 – 8888
Direct dial: 302.552.4329
Office: 302.552.4300
Fax: 302.651.7905
e-mail: jsshannon@mdwcg.com

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Thank you.

Jos. Scott Shannon
email: jsshannon@mdwcg.com
Firm Web Site: www.marshalldennehey.com

8/23/2007

FCI/MOC 0008

From: Gunter, Dan [mailto:dgunter@Riddellwilliams.com]

Sent: Friday, August 10, 2007 12:57 PM

To: Shannon, J. Scott; Wagner, Thomas P.

Cc: McVey, Patrick; Paul A. Bradley

Subject: Depositions of Cappellini and Peters

Gentlemen--

Not having heard from you regarding the depositions of Bert Cappellini and Mike Peters, we will serve you later today with notices of depositions of those gentlemen for August 30 and 31 (respectively), each beginning at 9:30 a.m. at Paul Bradley's office in Wilmington.

We would also be amenable to setting these depositions in New York, for the convenience of the witnesses. If the witnesses would prefer that location, please advise us as to the location, and we will amend the notices.

--Dan

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EXHIBIT 5

Gunter, Dan

From: Shannon, J. Scott [JSShannon@MDWCG.com]
Sent: Friday, August 10, 2007 1:06 PM
To: Gunter, Dan; McVey, Patrick; Paul A. Bradley
Cc: Wagner, Thomas P.
Subject: Depositions of Peters and Cappellini

Dan,
Availability for depositions:
Mike Peters -- Mon - Tues, Aug 27-28, Thurs, Aug 30
Bert Cappellini -- all week

New York would probably work best and we are amenable to holding the deps there. NEC Counsel's office is in Albany. Would that work for you?

Please advise. Many thanks.
s/Scott Shannon
MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN
1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899 – 8888
Direct dial: 302.552.4329
Office: 302.552.4300
Fax: 302.651.7905
e-mail: jsshannon@mdwcg.com

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Thank you.

Jos. Scott Shannon
email: jsshannon@mdwcg.com
Firm Web Site: www.marshalldennehey.com

8/23/2007

FCI/MOC 0010

EXHIBIT 6

Gunter, Dan

From: Gunter, Dan
Sent: Friday, August 10, 2007 1:36 PM
To: 'Shannon, J. Scott'; McVey, Patrick; Paul A. Bradley
Cc: Wagner, Thomas P.
Subject: RE: Depositions of Peters and Cappellini

Scott--

We can probably take Peters' dep on August 30 and Cappellini's on August 31.

I'll get back to you on location. Albany will probably work in general.

--Dan

-----Original Message-----

From: Shannon, J. Scott [mailto:JSShannon@MDWCG.com]
Sent: Friday, August 10, 2007 1:06 PM
To: Gunter, Dan; McVey, Patrick; Paul A. Bradley
Cc: Wagner, Thomas P.
Subject: Depositions of Peters and Cappellini

Dan,
Availability for depositions:
Mike Peters -- Mon - Tues, Aug 27-28, Thurs, Aug 30
Bert Cappellini -- all week

New York would probably work best and we are amenable to holding the deps there. NEC Counsel's office is in Albany. Would that work for you?

Please advise. Many thanks.

s/Scott Shannon
MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN
1220 North Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899 - 8888
Direct dial: 302.552.4329
Office: 302.552.4300
Fax: 302.651.7905
e-mail: jsshannon@mdwcg.com

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Thank you.

Jos. Scott Shannon
email: jsshannon@mdwcg.com
Firm Web Site: www.marshalldennehey.com

8/23/2007

FCI/MOC 0011

8/23/2007

FCI/MOC 0012

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | |
|--|--------------------------|
| <p>NORTHEAST CONTROLS, INC., 3 Enterprise Avenue Clifton Park New York, NY 12065</p> <p>ST. PAUL MERCURY INSURANCE COMPANY 385 Washington Street St. Paul, MN 55102</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>FISHER CONTROLS INTERNATIONAL, LLC 205 S. Center Street Marshalltown, Iowa 50158</p> <p style="text-align: center;">Defendant.</p> | <p>NO. 06-412</p> |
|--|--------------------------|

NOTICE OF DEPOSITION

To: J. Scott Shannon, Esquire
Marshall Dennehey Warner
Coleman & Goggin
1220 N. Market Street
5th Floor
Wilmington, DE 19801

Thomas P. Wagner, Esquire
Marshall Dennehey Warner
Coleman & Goggin
1845 Walnut Street
Philadelphia, PA 19103

PLEASE TAKE NOTICE that defendant Fisher Controls International, LLC will take the oral deposition by stenographic means of the following witnesses at the office of the undersigned at the time and date designated and continuing from day to day until completed:

- | | | |
|-----|-------------------|-----------------------------|
| A.) | Albert Cappellini | August 30, 2007 @ 9:30 a.m. |
| B.) | Michael Peters | August 31, 2007 @ 9:30 a.m. |

**MARON MARVEL BRADLEY
& ANDERSON, P.A.**

/s/ Paul A. Bradley

Paul A. Bradley (DE Bar ID #2156)

1201 N. Market Street, Suite 900

P.O. Box 288

Wilmington, DE 19899

(302) 425-5177 (phone)

(302) 428-0180 (fax)

pab@maronmarvel.com

Attorney for Defendant

Dated: August 10, 2007

cc: Wilcox & Fetzer

EXHIBIT 8

A REGIONAL DEFENSE LITIGATION LAW FIRM

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

A PROFESSIONAL CORPORATION www.marshalldennehey.com

PENNSYLVANIA
Bethlehem
Doylestown
Erie
Harrisburg
King of Prussia
Philadelphia
Pittsburgh
Scranton
Williamsport

NEW JERSEY
Cherry Hill
Roseland

DELAWARE
Wilmington

OHIO
Akron

FLORIDA
Ft. Lauderdale
Jacksonville
Orlando
Tampa

1845 Walnut Street · Philadelphia, PA 19103-4797
(215) 575-2600 · Fax (215) 575-0856

Direct Dial: 215-575-4562
Email: tpwagner@mdwecg.com

August 16, 2007



Patrick McVey, Esquire
Riddell Williams, P.S.
1001 Fourth Avenue Plaza - Suite 4500
Seattle, WA 98154-1065

*Re: Northeast Controls, Inc. & St. Paul Mercury Ins. Co. v. Fishers Controls, Int'l.
U.S.D.C., District of Delaware, Civil Action Number: 1:06-CV-00412 (SLR)
Our File Number: 19180-01682*

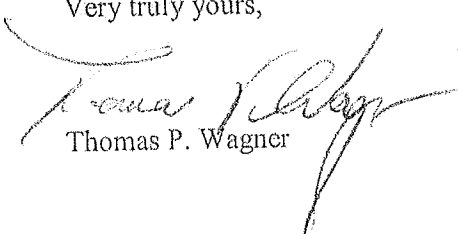
Dear Mr. McVey:

We have received your Notices of Deposition regarding Albert Cappellini and Michael Peters. We decline to produce these witnesses for deposition.

Mr. Cappellini was deposed extensively by all counsel, including you, in the underlying litigation. The parties in the current litigation have agreed that the discovery taken in the underlying litigation can be used in this matter. Thus, we see no legitimate reason for you to take his deposition again. You already had an ample opportunity to do so.

In addition, we received yesterday defendant Fisher's Motion to Amend its Counterclaim. As we understand it, your client is seeking to amend its counterclaim so as to assert for the first time an affirmative claim for monetary recovery against plaintiff Northeast Controls, Inc. Obviously, your client would need to establish a basis for this claim, and it will have the burden of proof with respect to that claim. We intend to oppose the Motion. We cannot allow depositions of any Northeast Controls personnel to go forward until we know whether or not your Motion will be granted.

Very truly yours,


Thomas P. Wagner

TPW/mmk

cc: Daniel Gunter, Esquire
Paul A. Bradley, Esquire

EXHIBIT 9

Gunter, Dan

From: Gunter, Dan
Sent: Monday, August 20, 2007 11:49 AM
To: 'Wagner, Thomas P.'
Cc: McVey, Patrick; 'Paul A. Bradley'; Shannon, J. Scott
Subject: NEC v. Fisher: depositions of Cappellini and Peters

Tom--

I left a short voice-mail for you, but am now following up with this email.

We have received your letter of August 16 in which plaintiffs state that they will not produce Messrs. Peters and Cappellini for the scheduled depositions. We believe that plaintiffs are obligated to present those witnesses and that the reasons set out in your letter are at best inadequate.

We wish to hold a Rule 37 conference to discuss this issue. In lieu of a telephonic conference, if you intend to stand by the position set out in your letter, you may simply advise us of your position by email response to this email.

If you feel that a telephonic conference is required before we present this matter to the court, please do not hesitate to contact me by telephone. If I am not at my desk, please leave me a message, then hit "0" and ask the receptionist to have me paged.

I request the courtesy of a response no later than the end of the business day on Wednesday, August 22.

Sincerely,

Daniel J. Gunter
Attorney at Law
Riddell Williams P.S.
1001 Fourth Avenue Plaza, Suite 4500
Seattle, WA 98154-1065
206-624-3600 (main)
206-389-1570 (direct)
206-498-5775 (cell)
206-389-1708 (fax)

8/23/2007

FCI/MOC 0016

EXHIBIT 10

Gunter, Dan

From: Wagner, Thomas P. [TPWagner@MDWCG.com]
Sent: Wednesday, August 22, 2007 6:24 AM
To: Gunter, Dan
Cc: Shannon, J. Scott
Subject: RE: NEC v. Fisher: depositions of Cappellini and Peters

Dan:

This responds to your voicemail and the e-mail message below. We have a conference with our client representatives set for Friday afternoon, 8/24/07. We will discuss this issue at that time, and we will get back to you shortly thereafter.

From: Gunter, Dan [mailto:dgunter@Riddellwilliams.com]
Sent: Monday, August 20, 2007 2:49 PM
To: Wagner, Thomas P.
Cc: McVey, Patrick; Paul A. Bradley; Shannon, J. Scott
Subject: NEC v. Fisher: depositions of Cappellini and Peters

Tom--

I left a short voice-mail for you, but am now following up with this email.

We have received your letter of August 16 in which plaintiffs state that they will not produce Messrs. Peters and Cappellini for the scheduled depositions. We believe that plaintiffs are obligated to present those witnesses and that the reasons set out in your letter are at best inadequate.

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If you feel that a telephonic conference is required before we present this matter to the court, please do not hesitate to contact me by telephone. If I am not at my desk, please leave me a message, then hit "0" and ask the receptionist to have me paged.

I request the courtesy of a response no later than the end of the business day on Wednesday, August 22.

Sincerely,

Daniel J. Gunter
Attorney at Law
Riddell Williams P.S.
1001 Fourth Avenue Plaza, Suite 4500
Seattle, WA 98154-1065
206-624-3600 (main)
206-389-1570 (direct)
206-498-5775 (cell)
206-389-1708 (fax)

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8/23/2007

FCI/MOC 0017

partnership or other entity, investment plan or arrangement discussed in this communication. If you have received this communication in error, please notify this firm immediately by collect call (206)-624-3600, or by reply to this communication.

EXHIBIT 11

Gunter, Dan

From: Wagner, Thomas P. [TPWagner@MDWCG.com]
Sent: Thursday, August 23, 2007 12:56 PM
To: Gunter, Dan
Subject: RE: NEC v. Fisher: depositions of Cappellini and Peters

Dan:

Frankly, I do not appreciate the tone of your message. The "delay" as you put it was caused by the untimely filing of defendant's motion to amend its counterclaim. We will give you our response after we have discussed the matter with the necessary representatives of our clients. Good day.

From: Gunter, Dan [mailto:dgunter@Riddellwilliams.com]
Sent: Thursday, August 23, 2007 1:55 PM
To: Wagner, Thomas P.
Cc: McVey, Patrick; Paul A. Bradley; Shannon, J. Scott
Subject: RE: NEC v. Fisher: depositions of Cappellini and Peters

Tom--

We anticipate a response no later than 5:00 p.m. EDT, Friday, August 24.

Given the delay unilaterally caused by plaintiffs, we will need to reschedule the depositions.

--Dan

-----Original Message-----

From: Wagner, Thomas P. [mailto:TPWagner@MDWCG.com]
Sent: Wednesday, August 22, 2007 6:24 AM
To: Gunter, Dan
Cc: Shannon, J. Scott
Subject: RE: NEC v. Fisher: depositions of Cappellini and Peters

Dan:

This responds to your voicemail and the e-mail message below. We have a conference with our client representatives set for Friday afternoon, 8/24/07. We will discuss this issue at that time, and we will get back to you shortly thereafter.

From: Gunter, Dan [mailto:dgunter@Riddellwilliams.com]
Sent: Monday, August 20, 2007 2:49 PM
To: Wagner, Thomas P.
Cc: McVey, Patrick; Paul A. Bradley; Shannon, J. Scott
Subject: NEC v. Fisher: depositions of Cappellini and Peters

Tom--

I left a short voice-mail for you, but am now following up with this email.

We have received your letter of August 16 in which plaintiffs state that they will not produce Messrs. Peters and Cappellini for the scheduled depositions. We believe that plaintiffs are obligated to present those witnesses and that the reasons set out in your letter are at best inadequate.

8/23/2007

FCI/MOC 0019

We wish to hold a Rule 37 conference to discuss this issue. In lieu of a telephonic conference, if you intend to stand by the position set out in your letter, you may simply advise us of your position by email response to this email.

If you feel that a telephonic conference is required before we present this matter to the court, please do not hesitate to contact me by telephone. If I am not at my desk, please leave me a message, then hit "0" and ask the receptionist to have me paged.

I request the courtesy of a response no later than the end of the business day on Wednesday, August 22.

Sincerely,

Daniel J. Gunter
Attorney at Law
Riddell Williams P.S.
1001 Fourth Avenue Plaza, Suite 4500
Seattle, WA 98154-1065
206-624-3600 (main)
206-389-1570 (direct)
206-498-5775 (cell)
206-389-1708 (fax)

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